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Supreme Court of Texas.
Eula Yancy, as Guardian of the Person and the Estate of Carletha Yates, an
Incapacitated Adult, Petitioner,
v.
United Surgical Partners International, Inc., Valley View Surgical Center,
Inc., and Judith Smith, R.N., Respondents.
No. 05-0925.

February 14, 2007

Appearances:
Bryce J. Denny, Seabaugh, Benson, Keene & Denny, Shreveport, LA, for petitioner.
David M. Walsh IV, Chamblee & Ryan, P.C., Dallas, TX, for respondents.

Before:

Scott A. Brister, Phil Johnson, Dale Wainwright, Nathan L. Hecht, Paul W. Green, David M. Medina, Harriet O'Neill, Don R. Willett, Wallace B. Jefferson, Supreme Court Justices.

CONTENTS
ORAL ARGUMENT OF BRYCE J. DENNY ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF DAVID M. WALSH IV ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF BRYCE J. DENNY ON BEHALF OF PETITIONER

JUSTICE: Be seated please. The Court is ready to hear argument in 05- 0925, Eula Yancy versus United Surgical Partners.
COURT MARSHALL: May it please the Court, Bryce Denny represent argument for the petitioner. The petitioner has reserve three minutes for rebuttal.

ORAL ARGUMENT OF BRYCE J. DENNY ON BEHALF OF THE PETITIONER

MR. DENNY: May it please the Court. And good morning, your Honors. This case really has two issues that have remained undecided by Texas Court and that is one whether day of the hearing replies the motions for summary judgment including those that contained objections should be banned, which I believe is the appropriate rule, and whether claims made on behalf of persons whose mental incompetency cannot be disputed by reason of persons and whose incompetency arose from the medical procedure in question should be told. In this case, one of the respondents filed a reply that included objections on the date of the summary judgment hearing. The Trial Court correctly and wisely ignored

it. But the Court of Appeals gave in effect and ruled on the objections that were made there. And I realized why there are cases that say that some objections are not waived by a party not obtaining a ruling from the Trial Court. It is not this issue that objections should be waived whether or not timely filed. In this case, Dallas County Court of Appeals has a local rule that says, "Replies should be filed three days before the hearing." I believe that rule 21(a) also has that requirement. I don't know of any judge, anywhere, even Louisiana where my office is located, that wants parties filing pleadings on the day of the hearing. It gives the judge no time to prepare. It certainly gives us the respondent to the motion for summary judgment when I handed the reply five minutes before the hearing. I have no time to formulate a lucid argument.

JUSTICE: When you say, you know, any kind of reply are you talking about the corrections to evidence or are you talking about a reply in terms of legalize argument on the respondent to the summary.

MR. DENNY: Your Honor, I'm, I'm referring to any type of reply including objections and I believe that one of the reason-- I believe it's valid used, they even characterized that and they say, "We filed a reply that included objections ...

JUSTICE: When I was in the practice the judge appreciated that legal argument. You know, you're going to make oral argument but the-- be presented here is our brief basically I'm, I'm in a legal-- our legal positions whether attend the morning of the hearing and before it was appreciated.

MR. DENNY: Well, Dallas county court rules clearly say a brief has to be filed with the response, with the motion and certainly not later than three days before the hearing.

JUSTICE: But you say that's also in our rules.

MR. DENNY: I believe that rule 21(a) does require that filing. And the Court of Appeals-- that we cite the cases in our brief had split on that whether some say three days before. Some say the day of the hearing is okay but clearly due process would entitle according to some knows of those objections. I don't think it's any burden on the movements to file their objections in their brief and arguments three days before the hearing.

JUSTICE: Why does the due process require [inaudible] that have sustain that objective trial that even knows it all and argue cases if that notes.

MR. DENNY: Well, because in a motion for summary-- it's just a different procedure, think about how disputed is already in favor of the movant. The movant files a motion for summary judgment has to give the respondent 21 days notice but if that's not complied with, so what? They can file a new motion. They can reset the hearing. But as respondent, if I don't file my response within that seven-day deadline, it's shrinking and it's in effect the death penalty for my case. The case is over with if the movant has summary judgment evidence and as respondent, I object to it. So what? They just re-file their motion again. They can file their motion as many times as the Trial Court's patience will tolerate. So the care of their objections, they get a second chance. They can re-file. They can carry those objections. But as the respondent, if there's objections made and they're sustained by the trial court, case is over. So the movant already has several significant procedural advantages. And this Court should not add another by saying, "Well, you can come in on late hearing, slap a set of objections in front of the trial court where the respondent is not prepared to argue." And not only other no consequences for the movant

but in this case it's the respondent that was heard because at that point we put in a great dilemma. The Court could say, "Well, you could have ask the Court to rule on the objections but when the Court doesn't and ignore some, certainly I'm not going to do that." The Court can imagine how my client would react and say, "Why did you ask the Court to rule on objections that were subsequently free if they were sustained, calls our case to get dismissed." There was no need to move for a continuance because again the trial court correctly ignored the objections and did not rule on them. The trial court did exactly what the trial court was supposed to do. But the Court of Appeals came in and said, "Well, we'll just revamp and I'll just rule on those objections." The summary judg-- and I think the case is where they have split. Corpus Christi Court says, "She need three days." Other Courts have said, "You don't need three days." I just think there just no reasonable or rational basis for allowing somebody to file something in response to a motion for a summary judgment on the date of the hearing, you'd be the equivalent of the parties coming in today and saying, "Here's our briefs, your Honors. Now let's argue." It simply makes the Court less prepared, gives the Court less opportunity to be ready for the hearing and it does the same -

JUSTICE: So -

MR. DENNY: - for the respondent.

JUSTICE: - assume all that's right, we agree with you and so it established that she was [inaudible] throughout the period. Tolling statute, in its own sense doesn't apply according to the code itself.

MR. DENNY: That is correct. And then that is how the trial court ruled. The trial was ...

JUSTICE: So, so none of that matters whether she she's [inaudible] except to your constitutionality check.

MR. DENNY: That, that is correct, there is-- come in, you have lawyer, everybody knew within a week. That's why when I have suffered has severe injury during surgery.

JUSTICE: That is correct. I have lawyers, lawyers file lawsuit but the lawyer didn't sue everybody. Was that see you then at the trial court?

MR. DENNY: No, no, no, no it was not me your Honor.

JUSTICE: Why do you sue some but not everybody then sue the hospital?

MR. DENNY: That's absolutely correct, so want ...

JUSTICE: So you're here asking us to declare it on constitutional because the lawyer who could have suit the hospital that and once [inaudible] ...

MR. DENNY: And if-- the guardianship and there's others that both I know probably the most troublesome issues for the Court and it's clear that Ms. Yates had a guardian, her mother but the Court has never; for example, punished minors because their parents did not file a suit. And there is a case ...

JUSTICE: There's, there's a difference, though, because minors turn majors at some point. But this might lead if whether the-- except the affidavits. He's never going to recover or back in any evidence so in one instance, there will be a deadline someday maybe 20 years down the road but at least 20 years. There's in this case that may never be.

MR. DENNY: Well, I, I think there's two factors, probably three. There's two factual factors and one legal factor. And certainly minors at some point can sue but minors also gets smarter and there's nothing smarter than a 16-year old. In this case, we'll never had any mental capacity whatsoever. There's-- she's in bed and there's nothing but

breath essentially.

JUSTICE: But what I'm just reading you're arguing, she [inaudible] her guardian [inaudible] 50 years.

MR. DENNY: And I think that is going to be a trouble speech by the Court but I think there's a way to resolve it because which really have are two constitutional rights bouncing that against each other. The first is, Ms. Yates rights under the Open Court that access the Court and not be punished because she is completely comatose and incompetent. On the other hand, your Honors, the respondent say, "Well, what about our due process argument we don't to be sued 50 years from now or 40 years from now when witnesses are going in the case of stale." There's a way to resolve that. That's their due process right. Bouncing up against our clients Open Court's right. And I think this Court can place some type of time limit on that because I agree that at some point, the only Court's doctrine would have bounced against due process. I don't think it's in this case -

JUSTICE: Okay.

MR. DENNY: - [inaudible] about three years. I, I think 10 years or 15 or 20, there's some point where the due process rights of the respondents overwrite ...

JUSTICE: What should it be? Should it be all when you demonstrated, you convicted the court for us. All right, then a reasonable time after that or that was reasonable time?

MR. DENNY: Well, this Court has said and the case just that escapes me that-- you know, the guardianship, there's another case whether there was a guardian, attorneys and well it does, it really matter.

JUSTICE: Ruiz versus Conoco?

MR. DENNY: Yes, thank you, your Honor. That's the same case where this Court talked about appellant's ...

JUSTICE: But that's, but that's different. That's a tolling provision where the legislature says, "We walk people of unsound mind not to have the limitations running against her." And so this Court said, "Okay, they said that." they didn't make any exception for the guard-- guardian for it.

JUSTICE: Your here, this is a medical malpractice sketch. This statute is a favorite of the doctors and of the legislature. And you're asking us to declare it unconstitutional as applied throwing ourselves in the grease when the alternative is to throw the lawyer in the grease who could have file the hospital timely. Why should we throw ourselves in the grease here rather than the lawyer. Why is that when you hired a guard-- got a guardian, and the guardians hired a lawyer and filed the suit plus we declare anything unconstitutional after that.

MR. DENNY: I think if the Court did not declare the statute unconstitutional when his done so for minors, there were be this rather bazaar that, that minors who at least at some mental functioning and it increases ordinarily as they approach majority, it makes no sense that incompetence especially Ms. Yates that she can do nothing that she set a mercy of her guardian or the mercy of this lawyer. And that she should not be punished for that. But ...

JUSTICE: So fine. Let her sue her lawyer or trial lawyer for not suing the hospital on the time. But-- you know, you're asking us to declare one of your favorite statutes unconstitutional because of something the lawyer could have easily done.

MR. DENNY: And I realized that it is the legislature doctor's favorite statute. But clearly when they drafted the no tolling provision, if any of the legislature grant this Court previous rule and

he should have bound; for example, that the minors no tolling provision had little [inaudible].

JUSTICE: And that's why in 4590(i) have said, "In no tolling provision in the world applies to this statute." We found that unconstitutional in a few cases, your right. But the question is, "Why we should do it again if somebody else is applying?"

MR. DENNY: I think the fact that-- and in some respects, you know I can sue the lawyer from malpractice as well as the doctors but I think it is important to proceed to declare unconstitutional when it's applied to someone who has permanently comatose and this Court has never held ...

JUSTICE: Well, the purpose of the tolling provision is to relieve the disability. It said, "There's someone who cannot bring her claim either the case I can't establi-- or because they're incapacitated to be able to breach the [inaudible]." But if you got a situation where they, they will appreciate it because they got the party and proceed on it. Once you re-allowed them to please made up. If the purpose of tolling provisions ...

MR. DENNY: Again, I think it's-- in that-- there is-- that's I realized that argument that I knew the court have to-- some difficulty with because I have some difficulty with the two. And that something I thought the Court of Appeals by Frankly with resolved instead of running of on these objections. But I don't think that the Court should place someone in Ms. Yates. She's comatose. She can't do nothing. Her mother is her guardian but her mother has a fairly heavy burden herself. She's taking care of her daughter everyday. Who is in a coma. I don't think that burden on to be on them especially Ms. Yates who can do nothing that they have to be on mercy of this lawyer or this-- or even her guardian, even her mother who of course is distracted by the obvious problems with her daughter.

JUSTICE: When do you want us to stop?

MR. DENNY: Well, I think at some point, what ...

JUSTICE: [inaudible]. The legislature says, "Give us limits." You're saying at some point, I have an counterfeit, what is the answer you want us to write?

MR. DENNY: I think the Court ought to say that we're again, reasonable people cannot deeper concerning the persons in-competency and in arose from the medical procedure in question that it's tolled for ten years.

JUSTICE: Why ten?

MR. DENNY: That's sort of just-- I mean you may-- you could argue 20 because the minor state he say, "Well, it's 20 for minors-- well, I mean 20 for incompetence." But that's really just got them looking at the ...

JUSTICE: Of course, we don't think that legislature may have tolled about that from the past statute? Look evidence and, and tolled about it? And decided not to toll?

MR. DENNY: I think in this case the, the legislative except to the no tolling rule, the legisla-- I don't, I don't-- ever since they thought they do it very cheerfully but I don't think will the legislature creates a statute that is so obviously going to be punched through for constitution they used for example as this Court is done for minors going in ...

JUSTICE: [inaudible] next from a concept but they and they have found it for ten years and they say, "Well, if you let it go for ten, Judge, why not 15?" 'Cause in our case, we had someone who was incompetent and everybody knows you used it. Why not 15? Don't we get

in to that, don't we get into that drawing line and into that the legislature [inaudible]

MR. DENNY: Well, in this case I don't know what the Court has to draw a line because here we're talking about less than four years and one thing that's clearly and does not bounce against their due process ...

JUSTICE: You have to draw a line because we're going to be moving a line a legislature is, is against. Isn't that drawing a line? We moved the passed for your client, client's file.

MR. DENNY: I do but I think in this case again, your Honor, it clearly the time of this case does not bounce-up against clearly the respondents, the respondents due process right. And so in this case I think that the Court doesn't necessarily have to draw these line as it 10 years, something argue 20 'cause it's comfortable to the minor statute. The Court could perhaps do what it did years ago when they-- before the Texas Court claim at was inactive and say, "There is some bright line and the legislature needs to come up with one," just that they said, "We're going to abrogate sought for the unity unless you the legislature come up with this tort claims act which is how we got here ...

JUSTICE: This is a part to argue that sometimes incapacitated people have access to the Court house. In this case, there was access. First, you have a guardian and a lawyer.

MR. DENNY: That is correct. She gave him a guardian and she gave him a lawyer. And in the end, I know-- I think the rational in Ruiz for not punishing to come across they had a guardian is the same rational, rational. Here even though it's a different, you know, it's a different statute.

JUSTICE: And then when she did have a lawyer. She filed affidavits that are rather superficial from motions that you say just when I'm qualified and she's not going to recover it. The defendant say, that's after which were conclusory and assuming that the objections were preserved, why is that even some evidence ...

MR. DENNY: But again, I think they were not but I think in this case and it, it's quite frank there's no clearing in the record. Look in the record that ever placed her incompetency at issue. She had a guardian, she plead that she was tolling capacity. There's no rule 93 verified denial saying, we verify, we're attacking the guardianship which is based under incapacity and of course the guardianship creates a presumption of incapacity. Nothing in either motion for summary judgment contest her incapacity and I think what the affidavit says she's comatose, that's no less conclusory that I want the Court of Appeals said was okay, which was he said that, unresponsive, uncommunicative and incapable occurring oneself is okay but saying their comatose or in a permanent vegetative status is not, it's such an obvious fact that she's bedridden, doing nothing. But it required no expert, no, no special entries. It's, it's no more than in my important track is were we have raised discrimination cases where someone says, either they say I am of this raise. Well, unless someone's put that in issues, that's conclusory.

JUSTICE: He don't need an expertise to prove that a person is counterfeit ...

MR. DENNY: I don't believe you do and your Honor are-- my-- finish my answer.

JUSTICE: Yes.

MR. DENNY: And your Honor, quite I think the affidavits were sufficient to raise that issues especially in fact, there was no

pleading anywhere in the record contesting Ms. Yates mental capacity.

JUSTICE: Other questions? Thank you counsel.

MR. DENNY: Thank you.

JUSTICE: The Court is ready to hear argument from the respondents.

COURT MARSHALL: May it please the Court, Mr. Walsh and Mr. Rodriguez will represent argument for the respondents. Mr. Walsh will take the first ten minutes.

ORAL ARGUMENT OF DAVID M. WALSH IV ON BEHALF OF THE RESPONDENT

MR. WALSH: May it please the Court, David Walsh on behalf of Valley View Surgical Center, and Ms. Smith. And there are two reasons in this Court should affirm the decision from the Dallas Court Appeals and I took money from the trial court. First, the evidence of, of-- what-- to start with the burden of proof to prove mutual incompetence was on Ms. Yancy and they need to carry the burden of proof because the evidence is conclusory.

JUSTICE: What's conclusory about comatose?

MR. WALSH: Well, it's to ...

JUSTICE: How many years of medical school yet go to, you know what comatose is?

MR. WALSH: No and that's not, that's not what the Dallas Court of Appeals was really directly attacking as being conclusory. It's the elements from Palla ver ...

JUSTICE: Comatose here, matter of law, unsound mind.

MR. WALSH: I, I, I will concede that for today, okay. But that's not what the Court Appeals say. It's the continually comatose from the date of the incident. And that's the part of its conclusory. The elements if we look back to Palla versus McDonald, Felan versus whoever, Tinkle versus Henderson. Most cases that the plaintiff relies on to get them to the mere incompetent state, all require three elements. First is ...

JUSTICE: Fam-- but so a family member could say, "I've been with her since this accident, she's been comatose the whole time."

MR. WALSH: Sure. I'm not ...

JUSTICE: Don't feel made an expert for that.

MR. WALSH: No. That's still maybe subject to being conclusory under the court's, court's previous opinions about sometimes statement of facts can be conclusory but as phrased someone who is with her everyday and saying she she doesn't move from her bed or whatever, whatever you want to say that would be sufficient to be there. The problem is we just have the words in the affidavits here of continuous unremitant bills from in it. We don't have anything that gives us to the idea of what facts the experts are relying on to get us from point a to point b being the time with the incident occurred until the lawsuit was filed against these people.

JUSTICE: Couldn't have you challenge the guardianship. I mean it seems to me like the truth of the matter is nobody really questioned this. It, it was a bit of a guardianship. Nobody is really questioned that she was comatose from dates what [inaudible]

MR. WALSH: I'm not going to stand here and say that, that is, that could, that I disagree with that-- she's comatose.

JUSTICE: But why should we require that if, that if, if there's going to be any argument about capacity.

JUSTICE: It has to get to verify denial opinion.

MR. WALSH: E-- except for, for my clients perspective they come to the Court house late in the game, they have say, "Hey, statute limitations has, has won to file motion summary judgment." The plaintiff never pled an exception were at something began around the statute limitations, so we show up and quote with our motion for summary judgment almost the 21 days goes by but nine days before the hearing, they filed the affidavit saying for the first time ever she's incapacitated and raising this issue so when will I-- whether I suppose to do with that ...

JUSTICE: The first time ever, I mean she proceed to the guardian and that tell you there [inaudible].

MR. WALSH: That may tell me that she's not incapacitated but it doesn't tell me when she was incapacitated if we look back to the element of continual, we know that there is a time frame when a guardianship spring up, we don't know that it was five years down the road. If you look to the ...

JUSTICE: But my point is if you're going to contest that aren't you requires the dates on.

MR. WALSH: I don't think so because if we-- let me, let me give you an example from ...

JUSTICE: From trial, you got a claim about that the guardian still should be there and the-- that's a continuing burden you have to show that the guardianship still needs to remain intact all the way through.

MR. WALSH: I would say, yes. But let me give you an example of where even under your scenario where I would challenge the guard-- or wouldn't challenge the guardianship and it creates the presumption of continuing incapacity where doesn't show from the beginning that it was continue-- meet' the continual apartment and that's the case of West versus Moore from the Houston Court of Appeals where some man had no [inaudible] in his mental status deteriorate all, all for a period of time until his mom had to take over to be his guardian. The Court there said, you know what at the inch you're right, he is incapacitated but back when your complaining about, about the time frame when the back that it was negligent, he wasn't incapacitated.

JUSTICE: Well, but the affidavit if, if its-- when you get, it says she is an [inaudible] state based on my review of her medical record she have been on such condition consistently and uninterrupted since her brain injury suffered on May 3, 2001 [inaudible] at Bellevue Surgery Center. She's been totally disabled continuously since May 3, 2000. That's continual.

MR. WALSH: Oh, except for what is the basis for the expert to say that.

JUSTICE: Personal obligation assessment maybe revealed at the medical record and diagnosis of the three oppositions.

MR. WALSH: And what, in a personal assessment it will give you essential from the day she visit which she now has to spring up back to the lawsuit. But what was you think before that. It does-- it gives me the-- I've read some medical records which the Court had said basically in Anderson versus Snyder and Burrow versus-- I assume it's Arce but I'm not sure ...

JUSTICE: But the record say, ten minutes with that oxygen nonresponsive. I mean, it ...

MR. WALSH: I've-- I'm ...

JUSTICE: - nobody's ever seen her in anything what have the [inaudible] Snyder say.

MR. WALSH: Even Dr. Ramirez in his deposition which they never

told anybody about this attach to summary judgment. Dr. Ramirez says, you know I, I've heard she's incapacity. He doesn't say mental or physical but I've heard she's incapacitated. And then goes on and the turning next page of the deposition say, I don't know because I haven't seen her medical records and I don't which was ...

JUSTICE: Let's, let's move on and just, just [inaudible] and let's assume that she wants a continuing incapacitated the evidence show that what is your argument about constitutionality of the, of the medical ability as.

MR. WALSH: Well, I was the issue that Mr. Roodriguez is-- was-- went to address ...

JUSTICE: Counsel. One of the questions that may have limitations. If tolling is properly raised, what are we-- that means? Why doesn't the movant have the burden to disapprove it or showing that there's no evidence to security.

MR. WALSH: That is correct in your ordinary summary judgment procedures. That is not correct for constitutional Open Court issues with regard to health care liability claims.

JUSTICE: Well, in our summary judgment, we said the statute limitation had supply-- has, has expired. And two, you can't use tolling provisions the very language of the statute says that. Their responses mean to say, "Hey, the statute is unconstitutional and by saying statutes unconstitution we know Walker versus Ramir or Walker versus Gutierrez and other cases." They have the burden to prove the statute was unconstitutional. So in the first step, we matter summary judgment burden. They've then to come forward with sufficient evidence to raise a fact issue to avoid summary judgment and ordinary summary judgment process, it's there burden of proof. It's their turn. Second ...

JUSTICE: So let me just be clear about that. You think that if remove themselves these limitations provision. And-- that respondent has raised the constitutional at the [inaudible]. And the respondent doesn't file the response at all. It doesn't safe. He can't comply it on appeal that's-- these unconstitution states.

MR. WALSH: He may legally be able to but he's got some evidentiary predicates to get into being legally able to say that. But what on the Open Court's discovery type of exceptions he still has to prove when it-- when you discover it or when you reasonably, they should have discover it. Same thing would apply here is that to prove his predicate of mental incapacity to get into the, debate whether it is unconstitutional or not.

JUSTICE: Or at least to raise factors.

MR. WALSH: Exactly. Any other question about the evidence. The rest of the time, I reserve to Mr. Rodriguez to tack up the Open Court's provisions. Thank you.

RODRIGUEZ: May it please the Court. My name is Rey Rodriguez and I represent respondent United Surgical and this petition for review proceedings. I would like to group my remarks at two broad areas. First, I'll explain why Open Court is not inapplicable in this case. And second, to explain why even if we didn't apply it at the Courts, it will not save this lawsuit from the bar of limitations. The outset-- it's important to know the factual context of this case. And the facts here really taken out of paradigm of an Open Court's case. In any of the stations, we can look at where Open Court's has been applied for instance Sacks versus Lawn involving a minor legally disabled from bringing a suit. We have a legally legislatively imposed if hospital condition to the bringing of the suit. The legislature does something

that disables the plaintiff from bringing an action. In Sacks, there was a fact that a minor can't access the Courts. In Neilsen, and in Eggle, there was a fact that injuries could not be discovered within a limitations period. In this case, we don't have that impossible condition. The undisputed evidentiary record establishes that Mrs. Yancy, as the guardian timely brought suit against the anesthesiologist and anesthesiologist practice group. She did so 19 months after the day of treatment.

JUSTICE: Why, why though is in the guardian [inaudible] by to as parent and as take person as guardian well, Sacks as well we're not going to depend on parents per se and so why we should we depend on guardian. They even be appoint.

MR. RODRIGUEZ: There's a very, very serious legal and definitional difference. In Sacks, points out that a parent doesn't have a legal obligation to bring a lawsuit. And in fact the parent can't be sued for failing to bring a lawsuit. Guardian completely different. The case laws clears of a judiciary relationship, the statute and the probate goes clear, the guardian has affirmative duty to bring and litigate those claims. And the guardianship statutes are also clear that the guardian can be sued by the word for any mislead or mishandling of the legal affairs of the word, so it ...

JUSTICE: What's the difference?

MR. RODRIGUEZ: That it is a difference with a distinction. The impossible condition here simply is not a predicate element which is not met here. It's interesting in Weiner versus Wasson, a justice owned and heard to send which rejoined in my Chief Justice Philips and Justice Hecht, stated that requiring a competent parent or legal guardian to bring suit is not an impossible condition prohibited by the Open Court's provision. Well, some folks may dispute that in the abstract, in this case it can't be disputed because that lawsuit was brought 19 months after the day of treatment. And no explanation anywhere in the record why the guardian laid it 21 more months before finally seemingly the facilities where the the treatment was rendered and my client is just an affiliated company. No explanation, whatsoever which also important to render on the record if when look back at that lawsuit timely found 19 months after the treatment. On pages 14 and 15 of the record, paragraph 5.04 of that original petition, the plaintiff, the guardian since I'm reserving the right to add other defendants. So she clearly proceed the potential to add other defendants but offers us no explanation why she didn't do it within the limitations period.

JUSTICE: What, what, what if she had, what if she ever got a lawyer, didn't have a guardian and for four years we had the motion leaves. Is that the indifferent case?

MR. RODRIGUEZ: If we have strictly an incapacitated plaintiff could just not have a guardian and he's unable to access the Court, I think that is a very different scenario.

JUSTICE: What should the rule be there?

MR. RODRIGUEZ: I think that kind of scenario where you truly don't have ability to access Courts is going to be a lot closer to the Court's decision in Ruiz versus Conoco and Sacks versus Noah.

JUSTICE: And she'll then we should over arching rule of payee and you look at all circumstances or some other time limits would be set in awesome, talk about maybe some reasonable time. What do you think the rule should be?

MR. RODRIGUEZ: Well, I think he definitely used a fact in circumstances test. Every case is going to be judge differently. Do I think that the constitution mandates a perpetual tolling of

limitations, I don't believe so. I believe that, that's what legislature in his action as this Court construed in Ruiz versus Conoco made the legislature choice to potentially leave limitations open in perpetuity but I don't think the Open Court provision requires that. And certainly this Court positions and cases like Shah versus Moss and others say, "It's only a reasonable time within which to bring a claim." It is not a perpetual tolling as Mr. Denney in his briefs suggested-- but now it's retrieve from a bit suggesting that the Court should drop some lines.

JUSTICE: Open Court requires some balancing. So you look on one hand to the considerations in support of the statute. And the legislature has reenacted this provision about three times, each a little differently saying, "We, we really have to have this to protect this other interest." You think it makes any difference after Sacks that the legislature has come back twice and said, "Now, we've looked at presumably and we'd looked around this again and this is really important this is got to be done."

MR. RODRIGUEZ: I think that's absolutely important consideration here that you have a consistent pattern of clearly stated legislative will. And balancing of the policy interest. A better of Court policy, is this the Court noted in the Owenscowling versus Carter case is the policy favoring baring of a stale parties. That's an important and legitimate interest that's advance by the statutes of limitations. That's why in Owens versus Carter, this Court appeal the adaption of other states statutes of limitations that would bar claims that wouldn't be barred at in this Court. If we apply the balance here, near Justice Hecht, I, I think this case is not control by Sacks versus Bowler, it could show exactly the opposite result. First, I've say there's no aggregation of a common law right here because the guardian has a lawsuit. And apparently recovered a satisfactory of a settlement from the anesthesiologist defendants. So she has that access to common law remedy. Second, we know that guardianship code provides an alternate form of remedy available to her. And three, as where the justices noted, their mark be a potential plain, I guest other professional advices if there's some basis for it. And I would suggest there is in this case. And furthermore, what's important here in Sacks, you have a false claim. We can't rely the mere possibility that a parent or interested person has timely going to file suit, that's not enough. We don't have that a near possibility here. We have an actual timely filed lawsuit. And really, the [inaudible] here, the Texas case did for many other is the presence of the guardian which was move the lean disability of a warrant. Ruiz versus Conoco both very careful to say that it was not a doubting point to rule that she couldn't preclude the claim qualified guardian. The Court specifically reserve that, so there could be circumstances where the action or in action of the guardian would preclude the suit. Tinkle which is a writ refuse case, it is even more direct to the point. There the Court noted that it was appropriate not to bar the place by limitations also because there was no timely appointed guardians. There was no guardian at the time of the alleged injury. The suggestion is that there have been one, then he run limitations which simply case also made important because it notes as to some of these case is dealing with the municipalities or tort claims at the cases. The case law holding that those notice provisions are going to be tolled during minority, absent removal of the disability. Renewable to the disability to access the Court. That's what happened here, there was a removal of disability and accepting of the Courts. Upholding independent of judiciary challenges and those disputes that

Mr. Wallcious spoken a few bound. So we would submit that the balancing test under Sacks and Bowler is satisfied. You, you decide, you need to go with the balancing test. If somehow the Court determines that maybe a close call on balancing, United Surgical submits that to the limitations period of the Lower Court's judgment should nonetheless be sustained because limitations period here has been a valid exercise of a police power. And that, that analysis, that paradigm goes all the away back in 1955, the Lepon case versus City of Galbestein, it was talked about in Chief Justice Philips said in a Locus case and also on the said in Weiner versus Lawsuit which is, yes, we do the balancing but even if we don't satisfy the balancing it's not over yet. It takes a separate inquiry and you take a look at balance exercise of police power. Under these facts, under circumstances presented here, we take it's definitely reasonable to require that the guardian timely file suit -

JUSTICE: The [inaudible] need a?

MR. RODRIGUEZ: - explanation that why it wasn't done. An it maybe their speculation, but it maybe, but the guardian sat down with her lawyers if they say-- you know, we got a first elimination of facts and we don't think that that's a good faith basis to sue this anesthesiologist defendants. Our probation is not that, what do you want to do. The guardian says, "I don't want to bring a frivolous lawsuit, let's leave them out of it." That very well could happen and if that's the case simply because we have new lawyers, we have new litigation strategies and new ideas doesn't mean that we should toll the limitations where there's at some kind of constitutional violation. Finally at note even if the Court would determine, there's an Open Court violation and the lawsuit here is not stated. Shah versus Moss says, "All you get is a reasonable time to bring the lawsuit." And Shah versus Moss, the Court held unreasonable as a matter of law a delay of 17 months from discovery of the suit, of the injury of institution of suits. Here, we have unexplained way of 21 months. No reason why this case should not be controlled by the bright lies of the barred that's been established in bar case law. And also then-- that the Shah positions starts favorably other decisions where time period as sure as 15 months or 12 months had been held to be a non-reasonable delay. Finally, as to the other due process challenges on objections on late found replies, I just like to know that there an opposite as to my client, my client not following objections. My client did not file any reply. So if the Court resolves the Open Courts issue as to my client certainly age shift for. We pray that the Lower Courts decisions be in all things affirm.

JUSTICE: Thank you, Mr. Rodriguez.

JUSTICE: Mr. Rodriguez made a-- It seems to me a fairly compeling argument that the case should stand just on the use on a Shah in decision alone.

REBUTTAL ARGUMENT OF BRYCE J. DENNY ON BEHALF OF PETITIONER

MR. DENNY: My recollection of the Shah decision, your Honors that it did not involve a totally incompetent comatose person and I think I don't know why the lawyer did not sue these other defendants within [inaudible]. But I they've suggest that it-- there was no large in that lawsuit in tolling because the guardian has change [inaudible] because

obvious other issues and resulted to depend on his lawyer and it's only not list, Yancy the guardian, it's truly this case. This case may control her lawyer. Aside from her lawyer, they can sue the [inaudible] party and she should not be at the mercy of this lawyer when she has no mental incapacity to judge what she's doing. And certainly she's not going to sue her mother who is frankly both is taking care of her daughter. The mother is the parent. And I think really is more analogist to a parent over a minor child then a guardian, is this not a professional guardian, a retained guardian, it's her mother, it's a parent.

JUSTICE: Why do you answer that-- the position of those bonds disability was lifted when a guardian was appointed.

MR. DENNY: I, I think that's not the-- I don't think that you become undisabled because you have a guardian. Ms. Yates still as a practical matter. You just look the-- has low mental capacity whatsoever. She could do absolutely nothing whether from school teacher to lying in bed breathing. And I think that she should not-- she should be at the mercy of her lawyer or her guardian in this situa-- there was no strategy decision not to sue these individuals. I think in this case that again, it makes no sense that had our less incurred what you know about the guardian. You file suit then the limitations should just runs way out here but if you have a guardian, then all of a sudden it's going to have this punitive in effect you better do everything right and again Ms. Yates can control that. And this is in a case we're in a battle of the experts over the incapacity. It's undisputed. She clearly has no capacity whatsoever.

JUSTICE: What makes it difficult that she also have a lawyer. You're asking us to-- unless you're asking us to, to give the lawyer for his-- from our fees from his fees.

MR. DENNY: No, that, that's not the case and, and perhaps there's a join issue here and I-- the lawyer has stated that it was tolled so joining the party is not a problem. That was his response to why they have joined. But I, I in a sense it does cannot let the lawyer off the hook if he made a mistake that certainly tolling there was not been stated by this Court. It's an open question. So I think the lawyer issue that [inaudible], he shouldn't joined these parties and not relied on the unsettled tolling question. So I guess ...

JUSTICE: Not unless it's tolled, okay? If this seven.

MR. DENNY: Yes, that was clear, you know, inquiry.

JUSTICE: Any further question?

MR. DENNY: Thank you.

JUSTICE: Thank you counsel. The case is submitted and the Court will have a brief recess.

2007 WL 5321817 (Tex.)